

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION**

UNITED STATES,

Plaintiff/Respondent,

v.

OSCAR PORTILLO-CERVANTES,

Defendant/Movant.

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Cr. No. C-06-6 (1)

C.A. No. C-06-550

**MEMORANDUM OPINION AND ORDER DENYING WITHOUT  
PREJUDICE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE**

Oscar Portillo-Cervantes (“Portillo”) was sentenced by this Court on August 24, 2006. (D.E. 21).<sup>1</sup> Final judgment was entered on August 30, 2006. (D.E. 24). Portillo timely appealed to the United States Court of Appeals for the Fifth Circuit. (D.E. 19). His appeal remains pending before that Court. (See generally docket sheet in United States v. Portillo-Cervantes, No. 06-41333 (5th Cir.)).

On December 4, 2006, the Clerk received from Portillo a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. (D.E. 34). This Court cannot address his § 2255 motion while his direct criminal appeal is pending. As the Fifth Circuit noted in Welsh v. United States: “A motion to vacate under 28 U.S.C. § 2255 will not be entertained during the pendency of a direct appeal, in as much as the disposition of the

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<sup>1</sup> Docket references are to the criminal case.

appeal may render the motion moot.” 404 F.2d 333, 333 (5th Cir. 1968), abrogated on other grounds, United States v. Ortega, 859 F.2d 327, 334 (5th Cir. 1988). Similarly, the outcome of Portillo’s appeal may moot some or all of the grounds raised in his motion.

For the foregoing reasons, Portillo’s § 2255 motion (D.E. 34) is DENIED WITHOUT PREJUDICE.

It is so ORDERED this 15th day of December, 2006.

  
HAYDEN HEAD  
CHIEF JUDGE